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IN THE

Supreme Court of the United States

October Term, 1968

No. 770

TED STEVEN CHIMEL,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR REHEARING

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STATE OF CALIFORNIA,

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On Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR REHEARING

Respondent respectfully prays the Court to grant a rehearing in the above-entitled case, which was decided on June 23, 1969, and is reported in 37 U.S.L.W. 4613. On June 26, 1969, Mr. Justice Stewart ordered the mandate stayed pending the timely filing and disposition of a petition for rehearing.

ARGUMENT

The Decision of This Court Overruling Harris and Rabinowitz Should Be Reconsidered and Rejected

The Court's decision holds that as a general rule a search incident to arrest is unlawful, and its fruits therefore inadmissible, if the search has extended beyond the person of the arrestee and his reach. In effect the Court has imposed a requirement that, except for searches conducted with a valid consent or in hot pursuit, all searches of premises must be pursuant to a search warrant. In so holding the Court expressly overrules two of its decisions, *United States v. Rabinowitz,* 339 U.S. 56, and *Harris v. United States,* 331 U.S. 145, which have stood for the proposition that the reasonableness of a search depends upon all the circumstances of the case rather than on the practicability of obtaining a search warrant. 37 U.S.L.W. at 4618.

These cases have been relied upon by this Court in recent decisions, *Cooper v. California,* 386 U.S. 58, 62; *Ker v. California,* 374 U.S. 23, 42, and by the various state and federal courts. As Mr. Justice Harlan observed only 12 months prior to the instant decision,

> ". . . an officer arresting on probable cause is entitled to make a very full incidental search,[5] . . . .

"[5]The leading case is United States v. Rabinowitz, 339 U.S. 56."

Sibron v. New York, 392 U.S. 40, 77 (concurring opinion). The time limitations on filing a petition for rehearing preclude the collection and listing of cases from all the States and federal circuits which have been fol-

lowing *Rabinowitz,* but many of these cases are collected in 82 A.L.R. 786 *et seq.,* 74 A.L.R. 1394 *et seq.,* 51 A.L.R. 434 *et seq.,* 32 A.L.R. 697 *et seq.,* and in the A.L.R. Blue Book of Supplemental Decisions to these annotations. Illustrative of the reliance on *Rabinowitz* (*see Abel v. United States,* 362 U.S. 217, 235-36), and therefore of the impact of the Court's decision in the instant case, is the fact that the highest courts in the five States having the greatest population in the last census, and thus presumably the most serious law enforcement problems, have relied upon the dictate of *Rabinowitz* (339 U.S. at 65-66) that the legality of searches of premises "turn[s] upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required."

See, e.g.,

People v. Berutko, 71 A.C. 89, 99 (1969) [453 P.2d 721, 727] (California);

People v. Braden, 34 Ill. 2d 516 (1966) [216 N.E. 2d 808, 809] (Illinois);

People v. Loria, 10 N.Y. 2d 368 (1961) [179 N.E. 2d 478, 482] (New York);

State v. Jemison, 14 Ohio St. 2d 47 (1968) [236 N.E. 2d 538, 542] (Ohio), *cert. denied,* 393 U.S. 943;

Commonwealth v. Negri, 414 Pa. 21 (1964) [198 A.2d 595, 600] (Pennsylvania).

The fact that, in the short time in which this petition could be filed, 70% of the States have joined in requesting that the Court's decision in the instant case be reconsidered (see *infra,* pp. 12-14) points out the impact of the decision on the current state of the law.

The District Attorney of Los Angeles County, which has a population of over 7,000,000, has estimated that "as many as 90% of the cases scheduled for trial could be affected in some way" by the Court's decision.[1]

As Mr. Justice Harlan noted in his concurring opinion, the effect of the Court's ruling on local law enforcement is "a factor to which the Court has not alluded." The "federal-state factor" is a crucial one under our form of government, and because of this Court's decisions

> ". . . every change in Fourth Amendment law must now be obeyed by state officials facing widely different problems of local law enforcement. We simply do not know the extent to which cities and towns across the nation are prepared to administer the greatly expanded warrant system which will be required by today's decision; . . . ."
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> *Chimel v. California,* 37 U.S.L.W. 4613, 4618 (concurring opinion).

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[1]Los Angeles Times, January 25, 1969, §1, at 3. District Attorney Evelle J. Younger added:

> " 'Of course, in many of those cases, we will have enough evidence to obtain a conviction without using that evidence which may have been tainted by the Supreme Court decision,' he said.
>
> "The district attorney estimated, however, that 'many, many' cases will be affected to an extent that his deputies may have to move for dismissal of charges for lack of evidence.
>
> ". . . .
>
> "He suggested . . . that if the ruling is made retroactive it could cause an unprecedented, massive log jam in trial courts."
>
> *Supra.*

As Mr. Justice Harlan noted for the Court in *Hoag v. New Jersey*, 356 U.S. 464,

> ". . . it has long been recognized as the very essence of our federalism that the States should have the widest latitude in the administration of their own systems of criminal justice. See Hurtado v. California, 110 U.S. 516; Maxwell v. Dow, 176 U.S. 581; West v. Louisiana, 194 U.S. 258; Twining v. New Jersey, 211 U.S. 78. . . ."
>
> *Supra* at 468.

In invalidating the present search, the Court has struck down a search which was conducted in a totally restrained and reasonable manner as an incident of an arrest whose validity is conceded by petitioner. The Court's conclusion that the search was unreasonable is based solely on the arresting officer's failure to proceed by way of a search warrant when he clearly had sufficient information to obtain one.

Studies of the warrant-issuing process[2] indicate that frequently the protection afforded by warrants is less than that ensured by responsible and restrained enforcement techniques on the part of the police and prosecutors, such as were employed in the present case. Furthermore, the multiple opportunities prior to and during trial to invoke the exclusionary rule illustrate that the choice before this Court is really between (1) burying police, prosecutors, and magistrates in the time-consuming paper work which is necessary to afford the usually sketchy prior judicial review of a search which

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[2]Landynski, Search and Seizure and the Supreme Court 194 (1966); Tiffany, McIntyre, and Rotenberg, Detection of Crime 115, 201, 204 (1967); La Fave, Arrest: The Decision to Take a Suspect Into Custody 15-16, 502-04 (1965).

takes place under search warrant-issuing procedure, and (2) continuing the flexible and more practical rule of judging the reasonableness of a search under all the factual circumstances of the case at a subsequent, meaningful adversary proceeding.

When the police are conceded the right to effect the most basic invasion of a person's privacy imaginable —the seizure of a man's body in arresting him—what additional invasion of privacy is incurred by virtue of the fact that concurrently the man's property (or, as in the present case, his victims' property) is seized as an incident of the arrest instead of by means of a search warrant?

As Mr. Justice Harlan stated in his concurring opinion,

> ". . . nor can we say with assurance that in each and every local situation, the warrant requirement plays an essential role in the protection of those fundamental liberties protected against state infringement by the Fourteenth Amendment."
>
> *Chimel v. California,* 37 U.S.L.W. 4613, 4618 (concurring opinion).

The Court's opinion in effect eliminates one of the most basic tools of law enforcement and at the same time greatly restricts the admission of the most reliable type of evidence—physical evidence. In many instances under the Court's ruling, evidence will be held inadmissible because it was not within the "reach" of the suspect at the time it was seized. In other instances the police, forced by the Court's decision to resort almost without exception to the warrant procedure, will have drawn up a detailed search warrant affidavit only to

have it deemed, on subsequent judicial review, to suffer from a fatal flaw. *See Spinelli v. United States*, 393 U.S. 410.

In the context of the present ruling, there is indeed an ironic, if not hollow, sound to the Court's recent pronouncements justifying new rules restricting the obtaining of confessions on the theory that the police should resort instead to other investigative skills and secure physical evidence of the suspect's guilt:

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. . . . This Court also has recognized that 'history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence. . . .' Haynes v. Washington, 373 U.S. 503, 519." (Footnotes omitted.) *Escobedo v. Illinois*, 378 U.S. 478, 488-90.
>
> ". . . As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the 'need' for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant. . . ." *Miranda v. Arizona*, 384 U.S. 436, 481. *See also supra*, at 447-48.

Brief mention will be made of what respondent considers to be specific errors of omission and commission in the Court's opinion. The general thrust of respondent's position is forcefully stated in the dissenting opinion of Mr. Justice White herein, concurred in by Mr. Justice Black.

The Court's opinion relies greatly on language in *Terry v. Ohio*, 392 U.S. 1, 20, to the effect that prior decisions of the Court had consistently held that advance judicial approval of searches and seizures through the warrant procedure must be obtained whenever "practicable." As pointed out at pages 94-95 of Respondent's Brief in the instant case, this language is sheer dictum unsupported by the cases which are cited for that proposition.

It is disturbing that the Court merely proceeds on the hypothesis that the arrest was valid and refuses to decide that question. (37 U.S.L.W. at 4614.) See *Giordenello v. United States*, 357 U.S. 480, 486. As the dissent points out, there was "doubtless probable cause . . . to arrest petitioner" (37 U.S.L.W. at 4620), a point conceded by petitioner. (Petitioner's Op. Br. p. 28.) The evidence constituting probable cause is set forth by the dissent in 37 U.S.L.W. at 4620 (n. 4). Significantly the dissent dwells at length upon the legality of the arrest, and upon the difficulty in distinguishing between the legality of an arrest on probable cause and the legality of a search for which there is probable cause and which is incident to the lawful arrest on probable cause. 37 U.S.L.W. at 4620-22. From this respondent gathers that the Court has deliberately left itself open, and left other courts open, to apply its reasoning to future cases to hold that where there is time to obtain an arrest war-

rant, a warrantless arrest on probable cause is unlawful and the product of the incidental search of the suspect's person inadmissible.

Two of the major issues in the case are dismissed by the Court in the following footnote:

> "The State has made various subsidiary contentions, including arguments that it would have been unduly burdensome to obtain a warrant specifying the coins to be seized and that introduction of the fruits of the search was harmless error. We reject those contentions as being without merit."

(37 U.S.L.W. at 4618 [n. 16].) Without dwelling at length on these issues respondent wishes to remind the Court that (1) thousands of stolen coins would have had to be described with great specificity in a search warrant affidavit in order to enable a magistrate to conclude that the police would be able to distinguish such coins from other coins known to be lawfully on the premises as part of petitioner's collection, *Stanford v. Texas,* 379 U.S. 476, 485-86; *Marron v. United States,* 275 U.S. 192, 196; *Aday v. Superior Court,* 55 Cal. 2d 789, 795-96 (1961) [362 P.2d 47, 51]; (2) prior to his arrest petitioner had admitted to friends of his that he had committed the present offense. (*See* 37 U.S.L.W. at 4620 and n.4 [dissenting opinion].)

Furthermore, the Court's opinion provides few if any guidelines to law enforcement in meeting practical problems posed by the decision. What is the "reach" of a suspect or "area from within which he might gain possession of a weapon or destructible evidence"? (37

U.S.L.W. at 4616, 4617.) Does this area vary with the physical build of the particular suspect or with his own mobility and dexterity? Is an area which the suspect could reach in three or four quick bounds within his "reach?" If the suspect is temporarily or permanently incapable of "reaching," does this restrict the scope of the search if the officer is aware, or should be aware, of this circumstance? If the suspect is moving through the house, may the officers search those areas which progressively come within his "reach?" If the suspect observes the officers at a distance of 50 feet approaching to arrest him, what is his "reach?" If he is placed in custody but makes an aborted attempt at escape, may the area where he is again restrained be searched to preclude the suspect from arming himself and destroying evidence? What if the moving suspect is out of the officers' line of vision for a short period of time? How does the Court's ruling affect the doctrine that contraband in plain view may be seized since no "search" is involved? May evidence which the suspect seizes and throws beyond the ambit of his "reach" be seized? These questions are not answered by the Court's opinion and promise to plague trial courts and appellate courts with constant problems of definition and distinction under the new rule propounded by the Court.

Since as a general rule the police must knock and announce their presence, it appears that suspects of average intelligence will have only to situate themselves in that part of the room away from the incriminating evidence in order to frustrate the search—or else, in answering the knock at the door, the suspect will in ef-

fect limit the scope of the search to his person and the doorway.

Assuming that the police effecting the arrest will already have sufficient information to obtain a search warrant, or will acquire such by reason of their observations at the time of the arrest (and this is decidedly *not* always the case), one of the most troublesome problems presented is: may the officer summon other officers to ensure that other persons present, or expected, on the premises will not destroy or secrete incriminating evidence while a search warrant is being obtained? What if there are several persons who are not arrested and who remain on the premises? Does this authorize the police to station several officers on the premises and physically to restrain each occupant anytime the occupant approaches any evidence which might readily be disposed of? As pointed out by the dissent (37 U.S.L.W. at 4620 [n.5]), the invasion of the privacy of the other occupants (who are perhaps innocent of any wrongdoing) would be at least as great as that resulting from a warrantless search of the premises incident to the lawful arrest of the suspect.

Also ominous is the fact that the Court's opinion says nothing about whether the decision is to be applied retroactively; in two *per curiam* decisions rendered the same day the Court specifically declines to pass upon the question whether the rule propounded in the present case is to be applied retroactively. *Von Cleef v. New Jersey*, 37 U.S.L.W. 3491; *Shipley v. California*, 37 U.S.L.W. 3492, and the Court makes the gratuitous and somewhat dubious observation that "Rabinowitz and Harris . . . have been relied upon less and less in our own decisions. . . ." (37 U.S.L.W. at 4618.) Re-

spondent would assume that under the compulsion of *Desist v. United States,* 394 U.S. 244, construing the Fourth Amendment principles set forth in *Katz v. United States,* 389 U.S. 347, to apply only to searches conducted after the date of that decision, the rule set forth in the present case clearly would apply only to searches conducted after June 23, 1969.[3]

The underlying weakness in the Court's opinion is succinctly stated by Mr. Justice White:

> "The majority today proscribes searches for which there is probable cause and which may prove fruitless unless carried out immediately. This rule will have no added effect whatsoever in protecting the rights of the criminal accused at trial against introduction of evidence seized without probable cause. Such evidence could not be introduced under the old rule. Nor does the majority today give any added protection to the right of privacy of those whose houses there is probable cause to search. A warrant would still be sworn out for those houses, and the privacy of their owners invaded."
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> *Chimel v. California,* 37 U.S.L.W. 4613, 4622 (dissenting opinion.)

Conclusion

For the foregoing reasons, a rehearing should be granted and the judgment of the California Supreme Court affirmed.

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[3]See also *Halliday v. United States,* 89 S. Ct. 1498; *Fuller v. Alaska,* 393 U.S. 80; *DeStefano v. Woods,* 392 U.S. 631; *Stovall v. Denno,* 388 U.S. 293; *Johnson v. New Jersey,* 384 U.S. 719.

The following States, through their respective Attorneys General, join respondent State of California in requesting that the Court reconsider its ruling herein:

ARIZONA
ARKANSAS
COLORADO
DELAWARE
GEORGIA
ILLINOIS
INDIANA
IOWA
KANSAS
KENTUCKY
LOUISIANA
MARYLAND
MASSACHUSETTS
MINNESOTA
MISSISSIPPI
MISSOURI
MONTANA
NEBRASKA
NEVADA
NEW JERSEY
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NORTH CAROLINA
OHIO
OKLAHOMA
OREGON
PENNSYLVANIA
SOUTH DAKOTA

TENNESSEE
TEXAS
UTAH
VERMONT
VIRGINIA
WASHINGTON
WISCONSIN
WYOMING
TERRITORY OF GUAM

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Certificate of Counsel

I certify that this petition is presented in good faith and not for delay.

RONALD M. GEORGE